

The Performance Review Podcast
Greenberg Traurig, LLP
Episode 28

Introduction ([00:00](#)):

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Michael Wertheim ([00:19](#)):

Welcome back to the Performance Review podcast. It's a new year. Welcome to 2025. We've got a new slate of episodes for you, and you might notice something different around here. You've got a couple of new hosts. Brian.

Brian Kelly ([00:33](#)):

Hello. Good to see you, Michael.

Michael Wertheim ([00:35](#)):

This is Michael Wertheim and Brian Kelly from Greenberg Traurig. We're excited to be taking over for Philip Person and Ryan Bykerk, who really led us off on season one. That's what we'll call the first 27 episodes of the Performance Review podcast. 27 episodes. It's like a full season of Law and Order. They started this back in September of 2020, have been putting out some really great content. We hope to pick up on where they left off. If you'll recall some of the last episodes, maybe you want to pause this podcast and go listen to them, but they handled several on reductions in force and expert witnesses, employee handbooks, workplace investigations, privacy laws. Brian, you know about it, because you were once a guest of the podcast.

Brian Kelly ([01:20](#)):

That's right, yeah. And now we've created a mutiny. We've taken over. Michael used to be a producer.

Michael Wertheim ([01:25](#)):

That's right.

Brian Kelly ([01:26](#)):

The talent, or the behind the microphone talent has become the front of the microphone talent and here we are.

Michael Wertheim ([01:33](#)):

So, Happy New Year.

Brian Kelly ([01:35](#)):

Yes, thank you. Of course.

Michael Wertheim ([01:36](#)):

Quarter century mark. I don't know how many days into the New Year is appropriate to say Happy New Year, but I think we can say it now.

Brian Kelly ([01:43](#)):

Yeah, and why not talk about some New Year's resolutions for the employment space? I've had AI top of mind for a while now. I think inevitably it's coming for all of our jobs, but I do feel confident that if I can beat AI in just a couple regards, that it'll assert human supremacy over the robots. And I think one easy area is paid sick leave laws. If I can programmatically memorize every single nuance between state, local, paid sick leave laws across the nation, I don't think any AI technology will ever be able to develop and catch up to us. So that's my personal goal for 2025. Michael, do you have any aspirations for 2025?

Michael Wertheim ([02:26](#)):

Yeah, I have plenty. I will test that out on December 31st, 2025, type into whatever version of GPT we're on and see if you can answer better than it can. For me, I think memorizing the calculations for the regular rate of overtime when employees receive additional pay, that one always befuddles me. So hopefully by the end of this year, we'll check notes and we'll be able to beat the computers, I guess.

Brian Kelly ([02:51](#)):

Okay, big goals.

Michael Wertheim ([02:53](#)):

Big goals, but that's what it's all about. So we're kicking this off, as it is a new year, there are a whole bunch of new California laws that have gone into effect that employers need to be aware of. I said need, not should. You need to be aware of these, and there are really more than we could cover and there's so much within them, and we can't cover them all in this episode, but what we can provide is a highlight reel of what's out there, what's to come. Notably, the amendments to the Private Attorneys General Act, PAGA, that went into effect at the middle of 2024 are now rearing their head. That's going to be a big deal in 2025. So we'll touch on that. We have a lot of content to go through. I'd also want to note that colleagues of ours, Vanessa Krumbein and Ellen Bandel just, in December, did a webinar that went through all of these new laws in detail. So feel free to check that out. But without further ado, welcome to the Performance Review podcast. Let's kick it off, Brian.

Brian Kelly ([03:51](#)):

Here we are. And I think the big goal for us, Michael, is to talk about employment law in a way that humanizes the very sometimes technical nature, especially in California of the law. And I think one of the reasons why people like you and I have chosen employment laws as our specialty, is that we like that it's human solutions to difficult problems. Employment is one of the biggest relationships all of us have in our lives, and we want to bring you that kind of real life, real world context to day-to-day employment legal practice. So let's start with some low-hanging fruit, Michael. We have our annual minimum wage and salary threshold increase, okay?

Michael Wertheim ([04:28](#)):

Sure.

Brian Kelly ([04:28](#)):

So effective January 1st, the minimum wage bumped up to 16.50 an hour. That's up 50 cents over last year, and that applies regardless of the size of employers. Now, there are certain localities and industry-specific exceptions that are even above that new 16.50 per hour. I think it's interesting to note, I'm sure you saw when you were at the ballot box a few months ago, Michael, that there was actually an initiative to raise the minimum wage even beyond that. But surprisingly, California voters said no by a not insignificant margin. But here we are, the ballot measure failed and we're at 16.50 an hour.

([05:08](#)):

Now, for salary threshold for exempt employees. To be an exempt employee, it's not just about the salary threshold, but also the job duties test. But the salary threshold is increasing to \$68,640 per year. California continues to lead in this area. I do think, off the top of my head, that's the highest salary threshold for exemptions in the country, New York City perhaps isn't far behind. And California only continues to separate itself from the baseline federal law, given that we just saw the DOL's proposed salary threshold increase be stayed on a nationwide basis a couple of months ago. So that's the lay of the land for California for minimum wage and salary threshold for exempt employees going into 2025.

Michael Wertheim ([05:54](#)):

Yeah. And so, it's the healthcare workers and fast food workers are the two, I think, key categories of worker that are going to have different salary thresholds. But just like throughout all of your experience with California employment law, always good to double check where you're at pretty much on a daily basis to make sure you're following it.

Brian Kelly ([06:13](#)):

And Michael, why does this matter with California's penalty structure for unpaid wages? What is the parade of horrors if you fail to, for instance, sufficiently raise an exempt employee's salary level effective January 1st, 2025?

Michael Wertheim ([06:29](#)):

Yeah, I mean, the waterfall of potential penalties that come from it are so draconian and it's so important to pay attention that you're keeping up with all of this stuff. So that's why we started with that one. Not really low-hanging fruit, really an important fruit to pick.

Brian Kelly ([06:44](#)):

Juicy fruit.

Michael Wertheim ([06:45](#)):

Yeah, exactly. So then moving on to another area, the AB-1815 expanded the definition of race within the Fair Employment and Housing Act, as well as the Unruh Act. That's Unruh, I want to make sure that's clear, because a lot of people pronounce it, "Un-rah." Named after a civil rights attorney, Jesse Unruh. And that applies to businesses as they interact with non-employees. So people come to your business. It's basically the same requirements as you'd have with an employee as to anti-discrimination, harassment, et cetera.

([07:19](#)):

But so, the definition of race was expanded to include protective hairstyles, to include hairstyles, braids, locks, twists. That already was part of California law as of a few years ago under the Crown Act, but this

specific statute then helps eliminate the word historically from that definition and just straight up says, "These protected hairstyles are included in the definition of race." And although seemingly potential minor change, employers need to pay attention to whether they have dress code or appearance requirements, or the guidelines related to that to make sure they're not running afoul of this new law.

Brian Kelly ([07:59](#)):

Yeah. You can imagine what a customer facing role in a retail operation, Michael, where there might be some old school notions of appropriate appearance. And I think it's clear under this new law that you cannot be casting too wide of a net and saying, "Your hair must look a certain way," because that's going to be linked to a protected characteristic of race.

Michael Wertheim ([08:20](#)):

Right, and could have a disparate impact in that way. So it requires additional attention. Yeah.

Brian Kelly ([08:25](#)):

All right. Moving on. So we have an important update to one of California's several leave of absence categories. And as you may be aware, California had already provided a leave of absence for victims of certain crimes and abuse, but there's an important expansion effective January 1st, 2025. So previously, the categories of crime and abuse that victims could take time off for, it was domestic violence, sexual assault and stalking.

([08:57](#)):

Now, however, the universe of bad acts that trigger an employee's right to take time off include any act, conduct or pattern of conduct that causes bodily injury, involves a firearm or other dangerous weapon, or in which an individual makes, uses or could be perceived to have an actual threat of force against another to cause injury. And it's very important to note that no one needs to be arrested or convicted of the underlying potential crime for this leave to apply. So it's simply enough for the employee in question to assert that they're facing what's now called a qualifying act of violence and they're permitted to take time off. Importantly, this leave doesn't apply only to the employee being the victim, but a covered family member being a victim too.

Michael Wertheim ([09:50](#)):

Yeah, that's a big expansion here.

Brian Kelly ([09:53](#)):

I think when you take a step back and you think about what was the purpose of this law, it's recognizing that abuse crimes against employees that threaten their safety are a major factor in someone's life. And if you're trying to evade that in the home, what's the one other place that you could easily be found by someone who's trying to perpetrate violence against you? It's at work. So giving people time off from work to obtain any kind of help or relief goes a long way towards that. So it's an important expansion of an already important leave of absence law in California for 2025.

Michael Wertheim ([10:30](#)):

Yeah. And I think that secondary piece on it, the expansion of it to family members, if you were facing a threat of violence, you could have protected leave already, but now it expands that, so that if someone

else in your family or someone in your care is facing that, you are able to take protected leave as well too.

Brian Kelly ([10:46](#)):

Yeah. One other note, it's clear now that paid sick leave can be used during this, because the leave in and of itself, the crime and abuse victim leave is unpaid. However, employees can choose to use any accrued time off under an employer's paid time offer or vacation policy, and also importantly, paid sick leave applies to this as well.

Michael Wertheim ([11:06](#)):

So another one, driver's license requirements are now prohibited in job postings. So if you had previously required someone to have and show a driver's license, that's now prohibited, unless they fall within a specific exception, wherein the job functions require driving. Again, this might seem like a small change, but an important one, because legislature determined that this could have a disparate impact on certain communities that don't drive or don't have access to get to a DMV.

([11:34](#)):

Brian, you're a city boy, you may not be driving all the time. If you're taking public transit, why would an employer's restriction in that way, why would you want to limit your applicant pool to people who may not otherwise have a license? Interesting thing to note is well, these apply to housing, so it prevents the landlords from discriminating against tenants who otherwise might not have a driver's license. So just an important piece for employers to take a look back at their job postings, make sure they've updated job duties and following along with this one.

Brian Kelly ([12:04](#)):

Yeah, and Michael, let's put on our future vision goggles for a minute. 20 years, 30 years down the road, are any of us driving and needing the driver's license, or are we all being driven by...

Michael Wertheim ([12:15](#)):

Yeah, or I'm in a multiverse somewhere. I don't drive at all. There's no vehicles.

Brian Kelly ([12:20](#)):

Exactly. Moving on, we have two fair chance ordinances that went into effect in the last few months. This was actually at the tail end of 2024. Now, the new Fair Chance ordinances are for Los Angeles County, the unincorporated areas, and San Diego County. Michael, you used to live in Los Angeles. Quick quiz for you on what the unincorporated areas of Los Angeles County are. Simple, yes or no. Is Malibu in an incorporated or unincorporated area of?

Michael Wertheim ([12:52](#)):

I love this quiz. I think Malibu feels unincorporated.

Brian Kelly ([12:55](#)):

That's actually incorrect, Michael. Malibu is incorporated, but you might be-

Michael Wertheim ([12:59](#)):

That's why I don't live there anymore.

Brian Kelly ([13:00](#)):

You're confusing with Malibu Lake, which is unincorporated.

Michael Wertheim ([13:04](#)):

Okay, great.

Brian Kelly ([13:05](#)):

The Malibu Lakes of the world are now covered by the Los Angeles County Unincorporated Area Fair Chance Ordinance, and this layers somewhat confusingly alongside the LA City Fair Chance Ordinance and California's existing law on the same topic. But this new one goes a little bit further in some respects, and it requires an affirmative statement in job postings, as to the material job duties that the employer will reasonably believe to be connected to an applicant's criminal history, if the employer in fact will consider criminal history for a job.

Michael Wertheim ([13:39](#)):

Whoa, whoa, whoa. What are these ordinances about? Let's get there. I mean, Malibu Lakes, this is like a lawyer stuff. What do we need to know about these Fair Chance Ordinances? This is a tightening and a more focused ban on using a person's criminal history in their job application materials and review. It limits the ability for employers to use that as part of the selection criteria, unless there are some very specific categories, right?

Brian Kelly ([14:05](#)):

That's right. And the thinking is, the criminal justice system is the venue through which people are sentenced for any wrongdoing that they've done, and it would be inappropriate for employers past someone's sentencing or conviction, or what have you to indirectly continue to penalize these people by refusing to hire them. The thought is, you can only consider criminal history in specific and related circumstances to the particular job, and there are certain exclusions on types of criminal history that can even be considered or not considered.

([14:38](#)):

This has been a growing trend in California. Unsurprisingly has been leading the country in many respects, but employers in many jurisdictions across the country have some form of these laws, but this Los Angeles County Unincorporated one has some of the more specific requirements for process. So we're not going to bore you going through all the details, other than if you have employees who are in unincorporated areas of LA County, please reach out to us, because there are many different footfalls you could have getting it right here. And same goes for San Diego County.

Michael Wertheim ([15:09](#)):

Well, yeah. If you think you're in Malibu, but you're at Malibu Lake, then yeah, I mean, exactly. You need a lawyer for that. And the fact that LA incorporated probably represents at least 30% of the people in the state or some very, very high number. Don't quote me on that, but important enough, and San Diego the same. You got to figure out all the potential nuances there. A couple others, just keeping this thing moving along. Again, like I said at the beginning, too much to go through all in one bite, but a couple of notice requirements. One that has to do with employee rights and responsibilities. If you've

had a job, you've been in maybe the break room, you'll see a whole bunch of posters. This is required in California to make sure that employees and workers are aware of their rights, and this particular law has to do with providing employees notice of their rights for basically whistleblowing, so that they're aware of the various nuances to that.

[\(16:03\)](#):

And I actually don't think that the content of this notice is out yet. This is a law that says they're going to be posting and coming up with language, and then they're going to have to post it. So that's one. The other is for workers' compensation notices, need to notify workers that they can consult with an attorney. That's an important piece for employees to be notified. They can consult an attorney and should, if that's what they want to do.

Brian Kelly ([16:35](#)):

Michael, for many of our more technologically advanced employer listeners, who heard you say the break room is the place where you see the poster, but perhaps they're a remote first company or only have a small number of employees in California, who are not sitting in a physical office, like they might have in other states. What should employers be doing? Should they be providing electronic links to these documents, to these notices?

Michael Wertheim ([16:59](#)):

Yeah, you got to think electronic links. You've got access to employee handbooks in a similar way, so you're going to have maybe an electronic repository of information that employees are going to get either out onboarding, very likely when you want to do that, but to keep ongoing access to that and maybe some reminders to make sure people have access to all that information. I think that probably makes sense.

Brian Kelly ([17:21](#)):

Update your posters. People be like that college freshman who always had the latest, coolest posters hanging up on their dorm room walls. All right, moving on. We have a new law regarding freelance workers. Now, freelance workers, you might be thinking, "Who the hell does that mean?"

[\(17:38\)](#):

Well, it means it means independent contractors and it doesn't mean independent contractors are the type that have multiple workers. Freelance worker under this particular new law that provides certain protections and rules, means a person or organization composed of no more than one person, whether they use a trade name or otherwise, so long as they're making more than \$250 for their services that they're providing to the hiring entity.

[\(18:07\)](#):

Now, the protections afforded to freelance workers under this new law are that they have to have a written agreement in place with the hiring entity. You can't have merely an oral agreement, okay? And within that written agreement, you need to have certain information, the names and addresses of both parties, an itemized list of services, the value and the compensation method for them. The payment due dates and the mechanisms for determining payments, and the due dates for the freelance worker to report the completion of services, so that payment can then be timely made.

[\(18:40\)](#):

It sounds like a little bit of a homework list. This law arises out of a level of informality that has come with the territory of non-employee workers and wanting to provide something akin to employment protections, while still acknowledging that independent contractors are not employees.

Michael Wertheim ([18:58](#)):

Yeah. I mean, and this dovetails with California's approach in the misclassification space, a history of classifying workers as non-exempt when they should have been exempt. And so, it seems like an effort to crystallize that movement, but also allow for specific protections within a very specific field tethered often to the entertainment industry or a lot of California specific type jobs, right?

Brian Kelly ([19:23](#)):

That's right. And I want to be clear, just because there's now this law that says you have to do X, Y, and Z when you retain a freelance worker, that isn't all of a sudden permission for employers to go out and nominally classify people as independent contractors, who otherwise clearly are under the control of the employer and should be classified as employees. Merely it's saying, "To the extent you have a worker who is a freelance worker and correctly identified, classified as an independent contractor, here's some rules of the road that you need to do when retaining that person."

([19:59](#)):

One other nuance under the law is that it requires timely payment of compensation, no later than 30 days after the completion of the services. So you can't string along a freelance worker for months on end without paying them. This is a little bit like final payment of wages requirements under employment laws, right? It's pulling in some of those themes and there's now a private right of action under this law to seek damages and including attorney's fees and cost. So you want to get this right.

Michael Wertheim ([20:28](#)):

Yeah, I mean that seems like one of the big takeaways is private right of action, attorney's fees. You hear that, red flags are going off, make sure you do it right, because that becomes sort of a feeding ground for a new litigation. Maybe what we've all been waiting for is a discussion of PAGA. In mid 2024, there was an effort to put an initiative on the ballot that would've repealed and replaced PAGA. And sort of at the 11th hour, the legislature got together with the governor and ended up amending it through the legislative channels, and probably the subject of what could be innumerable episodes. But I do think we want to talk about it here, because of the kickoff 2025, I see this as a major area of new litigation that's going to come out of it, and potentially some confusion of what is the impact. So just as a quick reminder, the Private Attorney's General Act is a statute that was enacted in 2004.

([21:18](#)):

It allows private right of action for employees to collect civil penalties for violations of the labor code. If they follow certain steps, they have to do some administrative filings. But the legislature at the Senate floor was finding, I'm quoting, "serious flaws in the PAGA have come to light due to some bad actors." They were finding that took almost a year longer when a private citizen was trying to enforce it, then when the state did. They found that it was often outsized penalties for small companies for really technical violations. So the new legislation is an effort to kind of clean that up. We're going to talk about it on future episodes, but just in broad strokes, the new statute allows for a cure period for smaller employers to be able to take a look at when a PAGA letter is filed. If they jump on it quickly, they essentially are rewards actors for acting in good faith.

([22:09](#)):

So employers for acting in good faith, if they get hit with one of these, they're able to cure. If you're a larger employer, over a hundred employees, you're able to go to court early and have this early evaluation, with a neutral that can provide some guidance on what you can do to cure. And there's another bunch of other nuances to this that impact the level of penalties, the percentage of penalties, all of which absolutely require attention. I think, again, in broad strokes, this is a pretty big deal in our space and the way that this is going to unfold is going to have a huge impact on our industry. Manageability is another piece of it, sort of codifies this notion that a court has discretion to limit the amount of evidence that would come in one of these cases. Again, a PAGA action is sort of like a class action, without a lot of the class action requirements.

[\(22:59\)](#):

It's allowing an employee to represent a bunch of your other employees for violations of the labor code. Breezing through this, but Brian, I mean this has become, I think in the last certainly 20 years, 10 years, the main part of California litigators practice in this space. I don't think these lawsuits are going to stop, but 2025 is going to bear out to show how these changes in 2024 impact the style of litigation, how companies should be evaluating this sort of stuff. So certainly more to follow on this. Another piece for construction workers, if you're defined as a construction employer, if you have a collective bargaining agreement that has wage rates above, at 130% or more of the minimum wage, there are some certain qualifications that allow you to be exempt from PAGA suits. So another area that if you're in that space, you want to make sure your collective bargaining agreement is reviewed, because being exempt from this could potentially prevent significant exposure.

Brian Kelly [\(24:00\)](#):

Tell me if you disagree. I don't think the volume of PAGA litigation has all of a sudden go down, but I think that the exposure, the amount of exposure in any particular case could go down, especially for employers who are interested in pretty swiftly attempting to cure the underlying violations. Is that your read of it too?

Michael Wertheim [\(24:20\)](#):

I think that's certainly the idea, to put people on notice that if there's a violation and it's a small one, that can be cured. Something like there's an inaccuracy on a wage statement, but the employee received all the compensation they were owed, but there's something inaccurate about the wage statement. It seems like you don't need to hit them with outside penalties, because what's the punishment there and what was the harm? And so, trying to rectify the commensurate punishment with the harm. We've run through a lot of stuff here. There's so much more. It's the beauty of California employment law and we appreciate you going on this journey with us, and there's a lot more to cover and we're going to. So certainly come back, but I think in closing, I think we need to apply what we've talked about to the real world. Right, Brian?

Brian Kelly [\(25:02\)](#):

That's right. So Ryan Bykerk and Philip Person used to do a segment at the end of each of their podcast episodes, where a guest or one of them would tell a crazy story about employment law. Michael and I are pop culture aficionados. Would you say that, Michael?

Michael Wertheim [\(25:16\)](#):

Yeah. Something like that.

Brian Kelly ([25:17](#)):

We're going to take the employment law lens and look at some of our favorite pop culture content, and think what's going on here from an employment law perspective? So why don't you join us on this journey? Michael, the first piece of pop culture that I like to cover is a 1982 film by Steven Spielberg called ET. Are you familiar with this film?

Michael Wertheim ([25:36](#)):

Sure. Yeah, who isn't?

Brian Kelly ([25:38](#)):

I think it's pretty clear in re-watching the film that ET is one of several alien employees on a critical work mission to go investigate another planet, get some plants, figure out if this planet is worth colonizing and destroying the local inhabitants, so on and so forth.

Michael Wertheim ([25:57](#)):

He's sent to California to go on a work trip.

Brian Kelly ([26:00](#)):

That's right. He's on a work trip to California. He probably lucked out compared to some other of his peers, but he's in California. ET does a little frolic and detour. He doesn't get back on the ship in time and all of a sudden he's absent from work. He's not showing up to work the next day, the ship goes home without him. He's not calling into work. Everyone knows ET is trying to phone home. He can't alert his employer that he's not going to be there the next day. While he's on this little frolic and detour in California, not showing up to work, we got to wonder, are ET's absences covered under any applicable law? I would say certainly not when he's slamming beers in Elliot's house from the fridge, watching TV.

Michael Wertheim ([26:40](#)):

I forgot about that scene.

Brian Kelly ([26:42](#)):

But ET does come with a pretty serious illness at one point. Now, he's not providing advanced notice of his absence due to illness. He can't yet phone home, but perhaps ET's absence is covered when he's sick.

Michael Wertheim ([26:56](#)):

I think this work trip presents a number of legal issues that are the type of things people call you about all the time. But I mean, the issues I'm seeing is he's certainly there for work. He's there for a work purpose. He might have some business expenses while he's there. Getting sick while he's out there seems like a justified reason to be absent. Not calling in, if you're the employer, you're thinking, "Hey, no call, no show."

([27:17](#)):

He's certainly was trying to phone home, but wasn't able to. But I think that this is certainly fraught with a number of perilous positions if you're the employer to punish him. He was serving his duty out in the field and regardless of extracurriculars that he might have partaken in, he was trying to get home. I mean, I think you got to give him the benefit of the doubt here.

Brian Kelly ([27:44](#)):

So I think we have to tread carefully. We're certainly not moving to termination with ET when he gets back home, right?

Michael Wertheim ([28:01](#)):

No way. Not for that-

Brian Kelly ([28:02](#)):

We're calling our lawyers. Yeah, calling our lawyers discussing whether a written warning, final written warning might be appropriate, but we're proceeding with caution. This is California after all.

Michael Wertheim ([28:12](#)):

I love it. And it's the '80s. Well, I appreciate this. We're going to dive into some more pop culture on future episodes, but in conclusion here, thank you for joining us on a blitz through the new California laws that are going to impact us going forward. We look forward to you joining us on future episodes. Thank you. And until next time, that was the Performance Review.

Brian Kelly ([28:34](#)):

See you next time.